SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 958

IRMA C. CUNDICK,
Petitioner,

vs.

J. R. BROADBENT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Irma C. Cundick, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on September 14, 1967.

CITATIONS TO OPINIONS BELOW

The District Court for the District of Wyoming did not issue an opinion. The opinion of the Circuit Court of Appeals (including Dissent) (R-8) is printed in Appendix A hereto. It has been reported in 383 F.2d 157.

JURISDICTION OF THIS COURT

The judgment of the Circuit Court of Appeals was given and entered on September 14, 1967 (R-9). Rehearing was denied on October 27, 1967. (R-11). A copy of the judgment of the Distrcit Court which was issued and filed on November 19, 1967, a copy of the judgment of the Circuit Court of Appeals, and the orders denying Petition for rehearing and suggestion for rehearing en banc, issued and filed, are printed in Appendix B hereto. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

The following questions result from the decision of the Tenth Circuit in this case, which decision is in conflict with decisions of other Circuits, decisions of the Supreme Court, former decisions of the Tenth Circuit and State Court decisions in these respects:

1. Whether the Tenth Circuit is correct in abandoning the previously established law to the effect that undisputed, uncontradicted, positive, clear, plausible, unbiased, competent, credible, unimpeached testimony coming from more than one witness, relative to the critical issue, must control the decision?

2. Whether the Tenth Circuit is correct in refusing to follow the holding of *Dexter v. Hall*, 82 U.S. 83, 15 Wall 9, that a contract by an insane person or one non compos mentis is void and incapable of ratification?

3. Whether the Tenth Circuit is correct in imposing on Plaintiff, in a matter in which the critical issue is the question of the competency of a person at the time of making a contract, a new and greater standard of proof than that required in other civil cases?

4. Whether the Tenth Circuit is correct in changing the previously established legal proposition to the effect that the trial court is in no better position to evaluate deposition testimony than is the appellate court?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

There are no constitutional provisions or statutes directly involved.

STATEMENT

This was an action for rescission of a contract brought by the Seller, Darwin A. Cundick, through Irma C. Cundick, Guardian Ad Litem, against the Buyer, J. R. Broadbent. Subsequent to the institution of the appeal to the Circuit Court, and on motion of Irma C. Cundick suggesting on the record the death of Darwin A. Cundick on May 30, 1966 as a result of a self-inflicted gun shot, Irma C. Cundick was substituted for the original Plaintiff as Appellant (R-2, 3).

Prior to bringing the action, Cundick requested rescission of the contract and offered to return to Respondent all monies received under it. Respondent denied the request. In this action, Cundick sought (1) a declaration that the contract was void ab initio and that the parties be restored to their former status, or (2) a declaration that the contract be rescinded and Cundick be restored to his property.

The action is based upon two grounds, either of which is sufficient within itself to sustain the action:

(1) Darwin A. Cundick lacked the legal capacity to enter into it. He lacked the ability to understand the obligations undertaken or the rights conferred.

(2) Darwin A. Cundick was of weak mind and Respondent over-reached him, dealt with him unfairly, subjected him to constructive fraud and induced him to enter an unconscionable contract for an inadequate consideration.

The answer of the Respondent (1) denied the mental incapacity and weakmindedness and incompetency of Darwin A. Cundick, (2) denied the unfairness of the contract, and (3) set up defenses of estoppel and ratification.

The consideration to be paid by Respondent under the contract for personal and real property involved in the ranch business sale was about $150,000.00. Its value according to the evidence was up to $330,000.00.

The *only* medical testimony before the court concerning the mental capacity of Darwin Cundick to understand the obligations undertaken or the rights conferred by this contract when he entered into it in September 1963 was given by three medical doctors (two by deposition) and by one psychologist. This testimony was to the effect that Cundick did *not* have the mental capacity to understand the obligations undertaken or the rights conferred by this contract when he entered into it in September 1963. They stated that their examinations reflected that he was suffering from damage to the brain which began in 1961 and which became progressively worse with the passage of time. There was no other evidence relative to Cundick's mental capacity at the time of the contract.

In a split decision (Judges Murrah and Breitenstein against Judge Hill), the U. S. Circuit Court of Appeals for the Tenth Circuit affirmed the judgment of the U. S. District Court for the District of Wyoming which dismissed the complaint and cause. A petition for rehearing and suggestion for rehearing en banc was denied.

BASIS FOR FEDERAL JURISDICTION

The basis for federal jurisdiction over this matter in the court of first instance, the United States District Court for the District of Wyoming, is pursuant to 28 U.S.C. Section 1332 inasmuch as Plaintiff was a citizen of the State of Wyoming and Defendant was a citizen of the State of Utah and the matter in controversy exceeded the sum or value of $10,000.00, exclusive of interest and costs.

REASONS FOR GRANTING THE WRIT

1. The majority opinion of the Tenth Circuit abandons the previously established law that undisputed, un-

contradicted, positive, clear, plausible, unbiased, competent, credible, unimpeached testimony, coming from more than one witness, relative to the critical issue, must control the decision. *Stafos vs. Missouri Pacific* (10th Cir.), 367 F. 2d 314; *Browning vs. Croush* (10th Cir.) 356 F. 2d 178, Cert. den. 384 U.S. 973, 86 S.Ct. 1864; *Potucek vs. Cordeleria Lourdes* (10th Cir.), 310 F. 2d 527, cert. den. 372 U.S. 930, 83 S.Ct. 875; *Nicholas vs. Davis* (10th Cir.), 204 F. 2d 200; *Rapid Transit Co. vs. U.S.* (10th Cir.), 295 F.2d 465; *Washington vs. Houston Lumber Co.* (10th Cir.), 310 F.2d 881; *NLRB vs. Ray Smith Transport Co.* (5th Cir.), 193 F.2d 142; *Ainsley vs. CIR* (3rd Cir.), 217 F.2d 252; *Roth Office Equipment Co. vs. Gallagher* (6th Cir.), 172 F. 2d 452; *Becker vs. Miller* (2nd Cir.), 7 F. 2d 293, app. dis., 269 U.S. 596, 46 S. Ct. 105; *Twentieth Century Fox vs. Dieckhaus* (8th Cir.) 153 F. 2d 893; *Joseph vs. Downers Grove* (7th Cir.), 104 F. 2d 974, cert. den. 308 U.S. 605, 60 S. Ct. 142; *Lorbeer vs. Weatherby* (Kan.), 376 P. 2d 926; *Cain vs. Grosshans & Petersen, Inc.*, (Kan.), 389 P. 2d 839; *In re Williams Will* (N. Mex.), 376 P. 2d 3; *Frederick vs. Younger Van Lines* (N. Mex.), 393 P. 2d 438; *Spillers vs. Colby* (Okla.), 391 P. 2d 895; *DeVas vs. Noble* (Utah), 369 P. 2d 290; *Twing vs. Schott* (Wyo.), 338 P. 2d 839.

The dissenting opinion of Judge Hill properly and convincingly analyzes the status of the evidence in this case and the treatment of it by the trial court and by the majority opinion. As stated in the dissenting opinion, the trial judge should be reversed for failure to follow the cases in the Tenth Circuit which established this legal proposition. (p. A 13 Infra).

As pointed out in the dissenting opinion (p. A 14 Infra), the majority opinion is contrary to the law of the State of Colorado (one of the states within the Tenth Circuit), as said law was established in a "strikingly similar case." *Ruffini v. Avara* (Colo.), 220 P. 2d 355.

If the holding of the Tenth Circuit in this case is allowed to stand, a new criteria will have been established

by which decisions can be made by the trial courts without a scintilla of supporting evidence. This is in conflict with the decisions of other Circuits, decisions of State Courts, and with former decisions of the Tenth Circuit.

2. In the majority opinion (p. A3 Infra), the Tenth Circuit Court indicated that the law as established by the U.S Supreme Court in the case of *Dexter v. Hall*, 82 U.S. 73, 15 Wall 9, to the effect that a contract by an insane person or one non compos mentis was void and incapable of ratification, was "tended away from" by some textbook writers and some courts. It then proceeded to decide this case contrary to the Supreme Court established law. It is respectfully submitted that the law established by the U.S. Supreme Court should be controlling upon the Circuit Court and the trial court, and that the same should be changed only by the Supreme Court (21 *C.J.S.* 343 and numerous cases cited thereunder).

If this holding is allowed to stand, the Tenth Circuit's position in this respect will be contrary to that enunciated by the Supreme Court.

3. The majority opinion when first filed on September 14, 1967, contained the statement that, "As applied to the critical issue of incompetency, this finding leads us to the conclusion reached by the trial judge that when the medical testimony, positive as it may be, is considered in the context of all that was said and done, it does not carry the *heavy burden of conclusively proving* that Cundick was incompetent***" (emphasis supplied) (R-7).

On October 12, 1967, and after the petition for rehearing was filed on September 29, 1967, a new page was substituted in the original opinion (R-8) which eliminated the word "conclusively". The opinion still refers to the burden of proof by Petitioner as "heavy" (p. A 10 Infra). The burden to have been properly borne by Petitioner in this, as in other civil cases, should have been only that of establishing the necessary elements by a "preponderance of the

evidence." *Lilienthal's Tobacco v. U.S.*, 97 U.S., 237, 24L. Ed. 901.

Also, the majority opinion is based on a "silent record". It criticizes the record (1) for failing to reflect something "said or done about a mental condition" to or by Cundick's family physician from December 1960 when the physician sent him to a psychiatrist, until March 1964 (p. A6 Infra) and (2) for failure to reflect "discussion of his mental condition among his family and friends in the community". (p. A9 Infra).

The unimpeached and uncontradicted evidence of Cundick's incompetency at the time of the contract, presented by Petitioner through testimony of four medical experts and supported by two lay witnesses, was sufficient to carry the burden and to require rebuttal without further inquiry of the family, physician or friends of Cundick. It is noted that inquiry or examination of these witnesses or of any other friends or relatives concerning discussions between them about Cundick's condition (as suggested by the majority opinion) would have been improper and objectionable as hearsay and without proper or possible foundation. Nevertheless, the majority opinion here considered this lack of testimony as positive evidence concerning Cundick's mental condition.

There was no material evidence before the court to counter the admittedly unimpeached and uncontradicted evidence of Cundick's mental condition at the time of the contract. The references in the majority opinion to counter the evidence of Cundick's incompetency are not only "trivial and inconsequential" as said in the dissenting opinion (p. A 11 Infra), but in fact most of it is not supported by the record and none of it is directed to Cundick's competency at the time of the contract.

To contend that negative evidence or a "silent record" is proper evidence to controvert direct, clear, positive, unimpeached evidence is to place an improper burden on the ap-

pellant—one far beyond previously established legal precedent. *Gaines v. City of New Orleans*, 73 U.S. 642, 6 Wall 642, 18 L.Ed. 950; *Dean v. Southern Ry Co.* (6th Cir.), 327 F. 2d 757; *Lilienthal's Tobacco v. U.S.*, 97 U.S. 237, 24 L. Ed 901.

The substitution of a new page in the opinion which eliminates the word "conclusive" may be a sufficient departure from accepted and usual procedure as to warrant concern; but, in any event, the original language of the opinion coupled with reliance on the "silent record" reflects that the minds of the two majority judges were conditioned to a false standard of proof on the issue of incompetency. The resulting decision sets precedent for a new and greater standard of proof on this issue than that required in other civil cases. This conflicts with former decisions of the Tenth Circuit and with decisions of other circuits.

4. The majority opinion changes the previously established legal proposition to the effect that the trial court is in no better position to evaluate deposition testimony than is the appellate court. In its majority opinion (p. A 7 Infra) the court said that the "trial judge who heard and saw the witnesses and felt the pulse beat of the lawsuit is, to be sure, the first and best judge of the weight and value to be given to *all* the evidence both expert and non-expert" (emphasis supplied). This is a radical change in the previously established legal proposition to the effect that the trial court is in no better position to evaluate deposition testimony than is the appellate court. *Skinner v. Parnell* (10th Cir.), 257 F. 2d 345. Much of the testimony in this case was by deposition. To say that the trial judge is the best judge of *all* of the evidence indicates that the majority opinion is based on an improper reliance on the manner in which the trial judge "felt the pulse beat" of the lawsuit rather than on considerable evidence which was no more subject to a feel of "pulse beat" by the trial court than by an appellate court and which evidence is plain, unimpeached and uncontroverted.

Again if this holding is allowed to stand, it will be in conflict with former decisions of the Tenth Circuit and with decisions of many other courts.

CONCLUSION

The widespread change in established law which results from the majority opinion is so serious and important as to make the issues here presented far transcend the interests of the particular facts and parties involved and to take them into the realm of important public interest.

For the reasons herein contained, this petition for a writ of certiorari should be granted. In fact, the action of the lower court is so improper and so contrary to settled law and prior decisions of this court that summary reversal is appropriate in this case.

Respectfully submitted,

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December 1967.

APPENDIX A

Opinion of the United States Court of Appeals
(with Dissent):

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

May 1967 Term

IRMA C. CUNDICK,
Appellant,

vs.

J. R. BROADBENT,
Appellee.

No. 8663

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF WYOMING

John J. Rooney for Appellant.

Edward T. Lazear (of the Firm of Loomis, Lazear, Wilson & Pickett) for Appellee

Before MURRAH, Chief Judge, BREITENSTEIN and HILL, Circuit Judges.

MURRAH, Chief Judge.

Irma Cundick, guardian ad litem for her husband, Darwin Cundick, brought this diversity suit in Wyoming to set aside an agreement for the sale of (1) livestock and equipment; (2) shares of stock in a development company; and (3) base range land in Wyoming. The alleged grounds for nullification were that at the time of the transaction Cundick was mentally incompetent to execute the agreement; that Broadbent, knowing of such incompetency, fraudulently represented to Cundick that the purchase price for the property described in the agreement was fair and just and that Cundick relied upon the false representations when he executed the agreement and transferred the property. The complaint further states that the guardian ad litem had offered to restore and does now offer to do so, but Broadbent has refused.

Upon a trial of the case without a jury, Judge Kerr made findings of fact in which he narrated the details of the months-long transaction. Specifically, he found that the various papers and documents embodying the agreement between the parties were prepared by Cundick's counsel and signed by Cundick in the presence of his counsel and his wife with her consent and approval; that the purchase price was paid and the transaction carried out between the date on which the agreement was executed, September 2, 1963, and the middle of February, 1964; that during this time neither Cundick nor his wife ever complained that he was incompetent or mentally incapable of transacting his own affairs, or that he was unable to understand and appreciate the effect of the transaction in which he had participated. He further found that Cundick's conduct during the critical time was the conduct and behavior of a competent person and there was no indication or evidence of any kind that Cundick was defrauded, imposed upon, deceived or overreached; that Cundick's election to rescind the agreement was not made until March, 1964, at which time the contract had been practically carried out; and that the election to rescind was not, therefore, sufficiently prompt.

The court concluded that Cundick failed to sustain the burden of proving that at the time of the transaction he was mentally incapable of managing his affairs; or that Broadbent knew of any mental deficiency when they entered into the agreement; or that Broadbent knowingly overreached him. The appeal is from a judgment dismissing the action. For reasons we shall state, the judgment is affirmed.

The contentions on appeal are twofold and stated alternatively: (1) that at the time of the transaction Cundick was totally incompetent to contract; that the agreement between the parties was therefore void ab initio, hence incapable of ratification; and (2) that in any event Cundick was mentally infirm and Broadbent knowingly overreached him; that the contract was therefore voidable, was not ratified—hence rescindable.

At one time, in this country and in England, it was the law that since a lunatic or non compos mentis had no mind with which to make an agreement, his contract was wholly void and incapable of ratification. But, if his mind was merely confused or weak so that he knew what he was doing yet was incapable of fully understanding the terms and effect of his agreement, he could indeed contract, but such contract would be voidable at his option. See Deuter v. Hall, 82 U.S. 9; see also Principles of Contract by Sir Frederick Pollock, 4th ed. 1888, p. 158. But in recent times courts have tended away from the concept of absolutely void contracts toward the notion that even though a contract be said to be void for lack of capacity to make it, it is nevertheless ratifiable at the instance of the incompetent party. The modern rule, and the weight of authority, seems to be as stated in 2 Jaeger's Williston on Contracts, 3d ed. §251, in which an Eighth Circuit case is cited and quoted to the effect that "***the contractual act by one claiming to be mentally deficient, but not under guardianship, absent fraud, or knowledge of such asserted incapacity by the other contracting party, is not a void act but at most only

voidable at the instance of the deficient party; and then only in accordance with certain equitable principles." Rubenstein v. Dr. Pepper Co., 228 F.2d 528. See also Williston, Secs. 253 and 254.

In recognition of different degrees of mental competency the weight of authority seems to hold that mental capacity to contract depends upon whether the allegedly disabled person possessed sufficient reason to enable him to understand the nature and effect of the act in issue. Even average intelligence is not essential to a valid bargain. Williston on Contracts, 2d ed., §256. In amplification of this principle, it has been said that if a maker of a contract "***has sufficient mental capacity to retain in his memory without prompting the extent and condition of his property and to comprehend how he is disposing of it and to whom and upon what consideration, then he possesses sufficient mental capacity to execute such instrument." Richard v Smith, 361 S.W.2d, 741, 742, citing and quoting Donaldson v. Johnson, 359 S.W. 2d 810, 813; see also Conerly v. Lewis, 117 So.2d 460; Matthews v. Acacia Mutual Life Insurance Co., 392 P.2d 369; Berry v. Berry, 114 So.2d 916. The Wyoming court adheres to the general principle that "Mere weakness of body or mind or both do not constitute what the law regards as mental incompetency sufficient to render a contract voidable. ***A condition which may be described by a physician as senile dementia may not be insanity in a legal sense." Kaleb v. Modern Woodmen of America, 64 P.2d 605, 607. Weak-mindedness is, however, highly relevant in determining whether the deficient party was overreached and defrauded. See Williston on Contracts, 3d ed., §256 and cases collected there.

From all this it may be said with reasonable assurance that if Cundick was utterly incapable of knowing the nature and effect of the transaction, the agreement is, without more, invalid, though capable of ratification by his representative or by him during lucid intervals. But, if the degree of disability was such that he was capable of contract-

ing, yet his mental condition rendered him susceptible of being overreached by an unscrupulous superior, his complaint comes under the heading of fraud to be proved as such. The burden is, of course, on the one asserting incompetency and fraud at the crucial time of the making of the challenged agreement.

Cundick was never judicially adjudged incompetent and his gaurdian ad litem apparently assumes the burden and accepts, as she must, the proposition that if the court's findings are supported by the record, they are conclusively binding here. She meets the issue squarely with the emphatic contention that the findings of the court are utterly without support in the record; that the evidence is all one way to the effect that at the time of the execution of the writings Cundick was mentally incompetent to make a valid contract. But, even if he was legally capable of doing so, she contends the evidence conclusively proves that he was weak-minded and that Broadbent defrauded him. It is suggested that the court significantly failed to make an affirmative finding on the issue of competency in the face of positive medical expert testimony to the effect that he was mentally incapable of conducting his affairs, particularly the sale and disposition of all his property.

All of the physicians who examined Cundick between 1961 and 1965 testified that in their judgment he was incapable of entering into the contract. When in December, 1960, Cundick first went to his family physician his condition was diagnosed as "depressive psychosis" and he was referred to a psychiatrist in Salt Lake City. While the Salt Lake City physician's report is not in evidence, the family physician apparently was informed by letter that Cundick had been given shock treatments. When Cundick returned to the family physician more than two years later, he was treated for sore throat and bronchitis. From that time until October, 1965, the family physician saw Cundick about 25 times and treated him for everything from a sore throat to a heart attack suffered in March, 1964, but nothing was

said or done about a mental condition. Apparently after this suit was filed and upon order of the court Cundick was examined in March, 1964, by two neurosurgeons in Cheyenne. By extensive tests it was established that Cundick was suffering from an atrophy of the frontal lobes of his brain diagnosed as pre-senile or premature arteriosclerosis. Both physicians used different language to say that from their examination in March, 1964, they were of the opinion that on the date of the transaction, i.e. September 2, 1963, Cundick was a "confused and befuddled man with very poor judgment", and although there were things he could do, he was, in their opinion, unable to handle his affairs at the time of the transaction. A psychologist to whom Cundick was referred in March by the Cheyenne neurosurgeons also testified that in his judgment Cundick was incapable of transacting his important business affairs in September of 1963. There was no medical testimony to the contrary. There was also lay testimony on behalf of Cundick to the effect that we has a quiet, reserved personality; that in approximately 1962 his personality changed from one of friendliness to inattentiveness and that during 1963 he was unable to make decisions with respect to the conduct of his ranching business.

This unimpeached testimony may not be disregarded and the trier of the fact is bound to honor it in the absence of countervailing evidence — expect or non-expert — upon which to rest a contrary finding. "But expert evidence does not foreclose lay testimony concerning the same matter which is within the knowledge and comprehension of the lay witness. A law witness may tell all he knows about a matter in issue even though it may tend to impugn the conclusions of the expert." Stafos v. Missouri Pacific Railroad Company, 367 F.2d 314, 317, and cases cited. The trier of the fact is not concluded by expert proof if other facts and circumstances of the case tend to cast doubt on its credibility. See Perlmutter v. C.I.R., 373 F2d 45, and cases cited; and see also Dayton P. & L. Co. v. Comm'n, 292 U.S. 290. It has even been said that opinion evidence in cases of this

kind is "***generally considered low grade and not entitled to much weight against positive testimony of actual facts." See In Re Meyers, 189 A.2d 852, 860.[1] The nature and circumstances of the transaction are certainly relevant evidence of the capacity of the parties to contract. The trial judge who heard and saw the witnesses and felt the pulse beat of the lawsuit is, to be sure, the first and best judge of the weight and value to be given to all of the evidence, both expert and non-expert.

Against the background of medical and lay evidence tending to show Cundick's incompetency on the crucial date, there is positive evidence to the effect that at the time in question he was 59 years old, married and operating a sheep ranch in Wyoming; that in previous years he had sold his lamb crop to Broadbent and on a date prior to this transaction the parties met at a midway point for the purpose of selling the current lamb crop. Although there is innuendo concerning what transpired at the meeting, neither party testified and no one else was present. We do know that the meeting resulted in a one page contract signed by both parties in which Cundick agreed to sell all of his ranching properties to Broadbent. It is undisputed that Cundick and his wife thereafter took this one page contract to their lawyer in Salt Lake City who refined and amplified it into an eleven page contract providing in detail the terms by which the sale was to be consummated. The contract was signed in the lawyer's office by Cundick and Broadbent in the presence of Cundick's wife and the lawyer. The lawyer testi-

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[1] In the comprehensive opinion in the Meyers case the Supreme Court of Pennsylvania recognized at p. 862 three classes of testimony in determining mental competency, "(1) the testimony of those who observed the speech and conduct of the person on the day of execution of the instrument whose validity is challenged; (2) the testimony of those who observed the speech and conduct of the person a reasonable time before and after the day of execution of the instrument; (3) the testimony of those who never observed the speech and conduct of the person. In the first two classes every witness, whether lay or expert, recites what he or she observed and then draws from the observation of such behavior as to competency or incompetency which is called an opinion. In the last class the inference is drawn after reading or hearing someone's recital of the person's speech and conduct, reliance being placed not on the observations of the witness but on the observations of another party. Obviously, the last class of testimony is not entitled to much weight." See also Cyrus v. Tharp, 126 S.E. 31.

fied that the contract had been explained in detail and that all parties apparently understood it.

Thereafter and on September 23, pursuant to the terms of the contract Cundick and Broadbent met at the Cundick ranch and the lamb crop was delivered to Broadbent who in turn delivered them to another purchaser. All of the arrangements for the delivery of the lamb crop were made by Cundick, and he and Broadbent worked the scales together and tallied the weights. Later, and on October 4, 1963, Cundick wrote to Broadbent notifying him that he was ready to deliver the remainder of the sheep on October 10. This date was unsatisfactory to Broadbent and the parties agreed to a postponement until October 17, Broadbent agreeing to pay all of the expenses caused by the delay. The parties met at the Cundick corral, as agreed, on October 17. Cundick and Broadbent, aided by their ranch hands, mouthed, separated, checked and counted the ewes according to age. Cundick participated in this operation and no one seemed to notice anything unusual about him, except that in the process of mouthing the sheep Cundick missed a number of the old ewes placing them with the young to his advantage.

Cundick's lawyer who drafted the contract testified concerning an office memorandum dated October 18 which recited that Mrs. Cundick had called him that day saying the sheep had been delivered and that Broadbent had made part payment on account of the contract including a check for the expenses incurred by Cundick due to the delay in taking delivery of the sheep. The memorandum recited that Broadbent had offered to call off the whole deal but that Cundick had refused.[2] The office memorandum further

[2] There was corroborated testimony that while the sheep were being "shaped up" and delivered, Mrs. Cundick was heard to say to Broadbent that "she didn't like the deal", and that Broadbent replied "Up to this point no one is hurt, the outfit is intact and if you don't like it you can have it." Mrs. Cundick then said "***A deal [is] a deal and we can go along with it." Curiously enough neither Broadbent nor Mrs. Cundick took the stand to testify in this case. But it was stipulated that if she testified she would deny that "an offer was made to rescind the full contract"; that instead "the offer was to rescind that portion of the contract which had to do with the base lands only ***." It was also stipulated that if Broadbent took the stand he would testify that "the offer was made."

stated that Broadbent had given Cundick a signed memo providing "1. Cundick will waive interest on balance of amount due on contract for one year and Broadbent will add $5 per acre on the land. 2. Any income from oil or gas royalties, or leases or private lands, or oil and gas, or minerals will be paid to seller." The office memorandum went on to state the increase in the sale price resulting from this modification.[3] Threafter Mr. and Mrs. Cundick took the memo to their lawyer and he prepared a supplemental agreement covering the changes reflected in the memo. This supplemental agreement was signed in the lawyer's office on October 24 after discussion between the parties. Thereafter and between October 24 and February, 1964, Cundick signed and delivered all the instruments including assignments, receipts and proxies necessary to fully complete the transactions in accordance with the contract as amended.

As we have seen Cundick was not treated nor did he consult a physician for his mental condition from the time he returned from Salt Lake City in early 1961, until he was examined apparently by order of the court in March, 1964, after this suit was commenced. There was, to be sure, evidence of a change in his personality and attitude toward his business affairs during this period. But the record is conspicuously silent concerning any discussion of his mental condition among his family and friends in the community where he lived and operated his ranch. Certainly, the record is barren of any discussion or comment in Broadbent's presence. It seems incredible that Cundick could have been utterly incapable of transacting his business affairs, yet such condition be unknown on this record to his family and friends, especially his wife who lived and worked with him and participated in the months-long transaction which she now contends was fraudulently conceived and perpetrated. All this record silence, together with the

[3] Trial counsel objected to the Salt Lake City lawyer's reading from this memo and "other notes and data" contained in his files. But there is nothing in these files, notes and data in the form of a communication which could properly be the subject of a confidential disclosure. See Wilcoxon v. United States, 231 F.2d 384.

affirmative evidence of normal behavior during the period of the transaction speaks loudly in support of the court's finding that Cundick's acts "***were the acts, conduct and behavior of a person competent to manage his affairs ***." As applied to the critical issue of incompetency, this finding leads us to the conclusion reached by the trial judge that when the medical testimony, positive as it may be, is considered in the context of all that was said and done, it does not carry the heavy burden of proving that Cundick was incompetent, i.e. he did not know the extent and condition of his property, how he was disposing of it, to whom and upon what consideration.

The narrated facts of this case amply support the trial court's finding to the effect that Broadbent did not deceive or overreach Cundick. In the absence of any evidence that Broadbent knew of Cundick's mental deficiency, the only evidence from which it can be said that Broadbent took advantage or overreached him is the proof concerning the value of the property sold under the contract. As to that, there is positive evidence that the property was worth very much more than what Broadbent paid for it. But as we have noted, there was evidence to the effect that after the original contract was signed and some complaint made about the purchase price, the parties agreed to raise the price and the contract was so modified. The trial court found that the contract was supported by adequate consideration and specifically that the price paid for the shares of stock in the development company far exceeded the amount for which it sold from 1957 to 1962. It is suggested that fraudulent implications should be drawn from the fact that a substantial dividend was paid to the shareholders of the development company within a year from the date of the subject transaction; that as a director Broadbent had knowledge of a corporate transaction which contributed at least in part to the dividend and that Cundick had no such knowledge. But, there is nothing on this record from which it can be said with assurance that Broadbent possessed any knowledge of corporate affairs or transactions which was

unavailable to Cundick or any other shareholder. Moreover, under applicable Wyoming law, a director does not stand in a fiducial relationship to a shareholder with regard to his stock. He has a right to purchase a shareholder's stock, and mere failure on the part of the director to disclose inside information does not compel an inference of fraud. See Morrison v. State Bank of Wheatland, 126 P.2d 793; But Cf. Blazer v. Black, 196 F.2d 139.

The Court finally concluded that the contract as amended was not unconscionable, unfair or inequitable. From the whole record we cannot say its conclusions in that respect are unsupported by the evidence. In this view of the case we have no occasion to consider whether the contract, if voidable, was in fact ratified.

AFFIRMED.

HILL, Circuit Judge, Dissenting:

I am compelled to disagree with my distinguished associates. A careful review of the entire record before us leaves me with a firm and definite conviction that not only has a mistake been made by the very able trial judge but it is my feeling that a gross miscarriage of justice has taken place.

The evidence relied upon by the trial court and by the majority is actually trivial and inconsequential as compared with the undisputed medical testimony in the record as to the mental competency of Cundick to comprehend and understand the nature of the transactions in which he was involved.

Viewing all of the evidence adduced by appellee in a light most favorable to him, I cannot say that it meets the test of substantial evidence and I must conclude that it actually has little or no probative value. Much of this evidence pertains to the "mouthing" or separating of sheep by Cundick in the consummation of the deal. Five witnesses testified about this matter. One such witness admitted he

did not have an opportunity to observe Cundick's ability to handle detailed business transactions. Another testified about mistakes made by Cundick in performing this simple "mouthing" operation. To me, none of this evidence even vaguely approaches the crucial issue of mental competency. Another Broadbent witness, a 89 year old lawyer from Evanston, Wyoming, admitted he "didn't have any occasion to make any observation about Cundick's ability to conduct his own business." The concluding evidence on behalf of Broadbent came from the deposition of lawyer Mark, who had prepared the legal documents in connection with the transaction in question. The fact that Mark testified only by deposition precludes the application of the rule that because of the trial judge's opportunity to observe and hear a witness personally testify, he is in a much better position to evaluate such testimony than is an appellate court. In this case, so far as the testimony of Mark is concerned, we are on an equal footing with the trial court and free to make our own independent evaluation. Mark was not asked to express his opinion as to the mental competency of Cundick. From all four corners of Mark's deposition it is plain that Mrs. Cundick, not Mr. Cundick, was the one actively participating in the conferences with Mark, and the one who was actually handling the consummation of the sale to Broadbent. What little participation is shown by Mr. Cundick was only through the guiding hand of Mrs. Cundick or Mark. This conclusion goes also to every act shown by the evidence to have been performed by Cundick in furtherance of the sale.

The one page longhand written agreement between Cundick and Broadbent was undisputedly written by Broadbent with only the two contracting parties present. It is significant to me that after every event that transpired in performance of the contract to sell, Cundick was relying upon another person for directions as to what he should do.

Both the trial court and my brothers seem to put some stress upon Mrs. Cundick's participation in the transaction. To me, what she did or said is immaterial. She is actually

a stranger to the transaction and her mental competency and understanding of the import of what was taking place cannot be a substitute for the required mental competency and understanding on the part of Mr. Cundick. The same may be said as to the materiality and importance of the testimony of lawyer Mark.

The trial court made no specific finding as to the mental competency of Cundick as of the date of the contract but did find generally "The acts and conduct of Cundick between September 2, 1963, and the middle of February, 1964, were the acts, conduct and behavior of a person competent to manage his affairs and cognizant of the effect of his actions." To me, there is no evidence in the record to support this sweeping finding. The evidence, as I have pointed out, shows without contradiction that during the above period of time every pertinent act by Cundick was performed under the guiding hand of either his wife, his lawyer or some other person.

The opinion of the majority accurately reflects the expert testimony adduced by appellant on the issue of the mental competency of Cundick to make the questioned contract. It was positive, convincing and undisputed. Under the law of this Circuit the trial judge was compelled to honor it.[1] Upon his failure to follow these cases, we should reverse.

Finally, on the question of whether Broadbent, in a legal sense, overreached Cundick, the evidence is uncontradicted that he did.

The evidence as to the true value of the property covered by the contract is uncontroverted. The 2252 acres of land involved sold for $39,510.00. A qualified expert on land values in the vicinity fixed the value at $86,189.00. Cundick's interest in Uinta Development Company sold for

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[1] Stafos v. Missouri Pacific, 10 Cir., 367 F.2d 314; Browning v. Crouse, 10 Cir., 356 F.2d 178, cert. denied, 384 U.S. 973; Potucek v. Cordeleria Lourdes, 10 Cir., 310 F.2d 527, cert. denied, 372 U.S. 930; Nicholas v. Davis, 10 Cir., 204 F.2d 200.

$46,750.00. Witness Spaulding for appellee testified this interest had a value of $73,743.45 and the three witnesses for appellant valued it at $184,358.63, $105,491.38 and $184,358.63. It is noteworthy that within a year after the date of the contract a dividend of $20,000.00 became payable upon Cundick's interest in the company and that Broadbent was one of the directors of Uinta on the date of the contract of sale and was in a position to have special knowledge about the company affairs and the value of its stocks.

It is well recognized by the authorities that transactions by a person of weak understanding are subject to close scrutiny. This principle recognizes the fact that advantage could quite easily be taken of such people. Therefore, evidence of weakness of mind and circumstances showing unfair dealing and inadequacy of consideration may present a situation where transactions taken should be rescinded. Williston, Contracts, § 256; 23 Am. Jur., Fraud and Deceit, § 15; 17 C.J.S., Contracts, § 133(1). The majority recognizes this principle but does not, I feel, apply it to this case. It has been clearly established here that even if Cundick was not incompetent he was in a weakened mental condition. The gross inadequacy of the consideration was set out above. These factors clearly establish the basis of the above principle. A strikingly similar case occurred in Colorado where an elderly rancher was persuaded by a person with whom he had had frequent livestock transactions to sell his ranch and cattle, having a worth of approximately $20,000.00, for about $8,000.00. Although the trial court found, on the basis of psychiatric evidence taken after the sale, that the rancher was incompetent, an alternative basis for the decision was: "Even though a mental condition may not amount to legal insanity, it may be sufficient to result in an inequality between the parties properly to be considered in connection with circumstances of unfair dealing and inadequacy of the consideration in determining whether a transaction vitiated by fraud, either actual or construc-

tive." Ruffini v. Avara, 220 P.2d 355 at 358. It is significant to note that no mention was made of whether the purchasers had any knowledge of the seller's lack of capacity. The court felt that "the circumstances [of the sale] in themselves would seem to indicate a lack of capacity to manage property * * *." Ibid. I believe the instant case fits within the above quoted principle.

It is inconceivable to me that any mentally competent person, with a lifetime of experience as a successful and substantial rancher and stockman, would dispose of his ranch interests at a price equal to less than one-half of the actual value. I would reverse and direct the entry of judgment in favor of appellant as prayed for.

APPENDIX B

Judgment of the United States District Court for the District of Wyoming:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

DARWIN A. CUNDICK by IRMA C. CUNDICK, Guardian ad Litem,

Plaintiff,

vs.

J. R. BROADBENT,

Defendant.

No. 4795 Civil

JUDGMENT OF DISMISSAL

The above-entitled matter having come on regularly for hearing before the Court, J. J. Hickey and John Rooney appearing as counsel for the Plaintiff, and Edward T. Lazear and Milton A. Oman appearing as counsel for the defendant, the Court heard the evidence submitted for and on behalf of the defendant; and took the matter under advisement; and the Court, having examined the memorandum briefs and having prepared and filed herein its Findings of Fact and Conclusions of Law finding generally for the defendant and against the plaintiff, and being fully advised in the premises.

It is Ordered that the complaint together with the cause be and the same is hereby dismissed with prejudice at plaintiff's cost to be taxed by the Clerk.

Dated this 19th day of November, 1965.

Ewing T. Kerr, Judge.

Judgment of the United States Court of Appeals of the Tenth Circuit:

FOURTH DAY, SEPTEMBER TERM,
THURSDAY, SEPTEMBER 14th, 1967.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges.

IRMA C. CUNDICK,
Appellant,

8663 vs.

J. R. BROADBENT,
Appellee.

Appeal from the United States District Court for the District of Wyoming.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

Orders of the United States Court of Appeals denying Petition for Rehearing and Suggestion for Rehearing En Banc:

THIRTY-FIFTH DAY, SEPTEMBER TERM,
FRIDAY, OCTOBER 27th, 1967.

IRMA C. CUNDICK,
Appellant,

8663 vs.

J. R. BROADBENT,
Appellee.

Appeal from the United States District Court for the District of Wyoming.

This cause came on to be heard on the petition of appellant for a rehearing herein en banc and was submitted to the court.

On consideration whereof, it is ordered that the said petition for rehearing en banc be and the same is hereby denied.

Before Honorable Alfred P. Murrah, Chief Judge and Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges.

IRMA C. CUNDICK,
Appellant,

8663 vs.

J. R. BROADBENT,
Appellee.

Appeal from the United States District Court for the District of Wyoming.

This cause came on to be heard on the petition of appellant for a hearing herein and was submitted to the court.

On consideration whereof, it is ordered that the said petition for rehearing be and the same is hereby denied.